

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On October 5, 1984 appellant, then a 30-year-old seasonal fire fighter, filed a traumatic injury claim alleging that he injured his back and hip on October 3, 1984 when he fell after his foot got caught on the brush. The Office accepted the claim for a low back strain which was subsequently expanded to include the consequential condition of depression. Appellant stopped work on October 4, 1984 and returned to work on April 1, 1985 and resigned from the employment on October 11, 1985. By letter dated July 7, 1986, the Office placed appellant on the periodic rolls for temporary total disability.<sup>1</sup>

In a letter dated May 11, 2001, the Office informed appellant that it proposed to reduce his benefits based upon his ability to earn wages as an administrative clerk. By decision dated June 27, 2001, it finalized the proposal and reduced appellant's compensation to reflect his wage-earning capacity in the position of administrative clerk.

In a letter dated March 12, 2007, appellant's counsel requested modification of the June 27, 2001 loss of wage-earning capacity decision. He contended that the June 21, 2007 decision had been erroneously issued as the Office did not consider the impact of the medications appellant took for his pain or his depression in finding that appellant was capable of performing the duties of the constructed position of administrative clerk. In addition, appellant contends that his condition has materially changed such that he is unable to perform the duties of the constructed position. He notes that his back condition has worsened to include his lower right back and "he has had increasing bouts of severe depression and suicidal ideation." Appellant also submitted medical and factual evidence in support of his request for modification of the wage-earning capacity decision.

By letters dated June 1 and August 1, 2007, appellant's counsel again requested modification of the June 27, 2001 loss of wage-earning capacity decision. Appellant contended that at the time the loss of wage-earning capacity decision was issued the Office had failed to meet its burden. Appellant's counsel also noted that he had requested modification in a letter dated March 12, 2007 and submitted medical evidence with his request and subsequently.

In an August 27, 2007 letter, appellant's counsel argued that the original loss of wage-earning capacity decision was in error as the Office failed to consider appellant's psychological condition.

On October 22, 2007 the Office responded to appellant's letters and informed him that his only option was to file a request for reconsideration which would be evaluated under the clear evidence of error standard as the request was more than a year after the June 27, 2001 loss of wage-earning capacity decision.

In a letter dated October 30, 2007, appellant's counsel requested reconsideration and argued that the June 27, 2001 decision was issued in error.

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<sup>1</sup> The Office issued an amended letter on September 15, 1989 to increase the percentage of appellant's rate of pay due to his marriage.

By decision dated February 21, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that the June 21, 2008 loss of wage-earning decision was in error.<sup>2</sup>

### **LEGAL PRECEDENT**

It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>3</sup> The burden of proof is on the party attempting to show modification.<sup>4</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>5</sup>

### **ANALYSIS**

The Office considered appellant's October 22, 2007 correspondence as a request for reconsideration of the June 27, 2001 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that appellant did not submit relevant evidence or legal argument establishing clear evidence of error. Appellant's counsel had previously requested modification of the June 21, 2001 loss of wage-earning capacity in letters dated March 12, June 1, August 1 and 27, 2007. In an October 22, 2007 letter, the Office informed appellant that he should file a request for reconsideration as the record did not contain medical evidence from a psychologist or psychiatrist stating appellant was unable to perform the administrative clerk position. In October 30, 2007 correspondence, appellant used the term reconsideration as instructed by the Office in its October 22, 2007 letter. He again reasserted that the Office erred in its June 21, 2001 wage-earning capacity determination as the Office failed to consider his accepted psychological condition in determining that the position of

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<sup>2</sup> The Board notes that, following the February 21, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB \_\_\_\_ (Docket No. 06-1564, issued February 27, 2007). *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>3</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>4</sup> *P.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1954, issued March 6, 2007); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>5</sup> *Gary L. Moreland*, 54 ECAB 638 (2003). See also *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004) (in *Peoples* and *Taylor*, the Board determined that the claimants requests for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside the Office's decisions denying appellants reconsideration requests as untimely and remanded the cases for the Office to address the merits of their requests for modification of a loss of wage-earning capacity decision).

administrative clerk represented his wage-earning capacity. The Board finds that appellant's October 30, 2007 letter is a request for modification of the Office's June 27, 2001 wage-earning capacity determination.<sup>6</sup> This request for modification is not a request for a review of the June 21, 2001 decision under 5 U.S.C. § 8128(a). Appellant had previously requested the Office to consider modification of the June 21, 2001 loss of wage-earning capacity in letters dated March 12, June 1, August 1 and 27, 2007. The Office did not issue a decision on appellant's request, but instead advised him to file a request for reconsideration. Therefore, the Board finds that the Office incorrectly characterized appellant's October 22, 2007 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

The Board finds that appellant has requested modification of the June 27, 2001 wage-earning capacity determination. Appellant is entitled to a decision on that issue.<sup>7</sup> On remand, the Office shall adjudicate appellant's request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

### **CONCLUSION**

The Board finds that appellant requested modification of the June 27, 2001 wage-earning capacity determination and is entitled to a decision on the wage-earning capacity issue. The case will be remanded to the Office for an appropriate decision.

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<sup>6</sup> See Gary L. Moreland, *supra* note 5.

<sup>7</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 21, 2008 is set aside and the case remanded for further action consistent with this decision.

Issued: April 16, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board